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CHARITIES

TOWARDS A NEW DEFINITION

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PART I : INTRODUCTION

A GENERAL

Charitable activity has had an great influence in the history of New Zealand and this influence continues . The number of charitable bodies is large and continues to grow. Some bodies are small and operate at street level, others are international multimillion dollar organizations. Charitable trusts are also created from time to time. A charitable trust is created whenever a person gives property to another person, called a trustee, on the basis that they will hold the property for some charitable objects. The trustee is compelled in equity to deal with the property in such a way that the real benefit of the property accrues to the objects of the trust. The giving of one's time and resources to help others not because one is required to do so or will make money from it, but because it is for the good of the community, is an activity that governments have for many years thought fit to encourage and subsidise. To this end the law endows charities with certain privileges. These are:

1 A charitable trust can be made to last perpetually, provided it *vests* within the relevant perpetuity period. This differs from a non-charitable trust which will be void if it is made to last perpetually.

2 Charitable trusts do not require a human beneficiary to enforce them as do non-charitable trusts.

3 Uncertainty as to object will not invalidate a charitable trust as it will a non-charaitable trust.

4 Charitable trusts enjoy various advantages in respect of taxation.

In addition to these legal advantages charitable status has come to symbolise stability and respectability.

It is clear that decisions in respect of the definition of charity have social implications. The judge in deciding what is charitable is making a decision of great importance. He or she is determining the areas into which benevolence can be directed with the greatest effect. Nevertheless it is almost impossible to determine the general policy on which the decisions are made. Lord Sterndale, M.R. in *Re Tetley*[1] makes this point clearly:

> "I am unable to find any principle which will guide one easily, and safely, through the tangle of the cases as to what is and what is not a charitable gift. If it is possible I hope sincerely that at some time or other a principle will be laid down. The whole subject is in an artificial atmosphere altogether. A large number of gifts are held charitable which would not be called charitable in the ordinary acceptation of the term, and when one takes gifts which have been held not to be charitable, it is very difficult to see what the principle is on which the distinction rests."

Since charities are endorsed with the privileges described above, and also given direct government subsidisation, it is essential for the scope of charities to be properly defined. The issue of which activities the government is prepared to

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1 *Re Tetley* [1923] 1 Ch 258, 266.

encourage and subsidise is a crucial one and is one of concern to the many taxpayers who provide for the millions of dollars worth of fiscal privileges which charities enjoy each year. It is also a crucial issue for the many organisations which each year endeavour to establish themselves as charitable bodies. This paper aims to highlight the problems with the present definition of charity, and to consider some possible approaches to reformulating the definition.

B LEGAL DEFINITION OF CHARITY

The starting point for any discussion on the legal definition of charity must be the Charitable Uses Act 1601. The preamble to the Act lists the following purposes as being charitable:

> "The relief of aged, impotent and poor people; the maintenance of sick and maimed soldiers and mariners; schools of learning, free schools, and scholars of universities; the repair of bridges, ports, havens, causeways, churches, seabanks and highways; the education and preferment of orphans; the relief, stock of maintenance for houses of correction; the marriage of poor maids; the supportation, aid and help of young tradesmen, handicraftsmen and persons decayed; the aid or ease of any poor inhabitants concerning payment".

The preamble does not purport to be an exhaustive list of charitable purposes, but provides general guidance as to the kind of purpose which should be regarded as charitable. From this list of purposes the modern concept of charities has evolved. Traditionally the courts have taken the approach of

ascertaining whether a particular purpose is sufficiently analogous with the preamble. More recently a more flexible approach has been adopted. This approach permits the court to consider if the purpose is "within the spirit and intendment" or "within the equity" of the statute. In this way, the connection with the preamble has become less and less direct. Russel L.J in *Incorporating Council of Law Reporting for England and Wales v AG*[2] took the view that a purpose beneficial to the community should be regarded as charitable unless it was a purpose which could not have been intended by the draftsman of the Elizabethan statute even if he had been aware of the changes which had taken place in society since 1601. In *Income Tax Special Purposes Commissioners* v *Pemsel*[3] Lord Macnaghten summarised the charitable purposes from the preamble into the following four classes:

1) Trusts for the relief of poverty;
2) Trusts for the advancement of education;
3) Trusts for the advancement of religion; and
4) Trusts for other purposes beneficial to the community not falling under any of the preceding heads.

There is also one further requirement , that is that the purposes must be for the public benefit.[4] So if a purpose falls within one of the four classes and is for the public benefit it

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2 [1972] Ch 73 at 88 per Russel L.J

3 [1891] AC 531.

4 This requirement does not apply to gifts/trusts etc which are for the relief of poverty, see for example *Dingle* v *Turner* [1972] AC 601.

will be charitable (obviously if a purpose falls within the fourth class it will be for the public benefit anyway). Lord Macnaghten's classification has largely superseded the 1601 preamble although in cases under the head of "purposes beneficial to the community" the courts still refer to the preamble for guidance. It is this head which has probably caused most problems and in which there is such a volume of case law.

PART II : SOME OF THE PROBLEMS WITH THE PRESENT DEFINITION.

A GENERAL

The first point to make about the so-called definition of charity is that it is not really a definition at all. *Pemsel's* four categories are merely a classification. The terms used are extremely vague and give no enunciation of a general principle to be used in determining what is and is not a charity. The fourth head "other purposes beneficial to the comminity" is particularly vague and is only applicable with reference to the preamble to the Charitable Uses Act 1601 and the relevant cases. However in some cases it is hard to determine anything but a remote association with the objects in the preamble. For example, in *Re Dupree's Trusts*[5] Vaisey J held charitable a gift for the promotion of an annual chess tournament for boys and young men in Portsmouth.The preamble itself is also not a definition but rather a list of objects which reflect the main areas of social need and concern at the time when the Act was

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5 [1945] Ch 16.

passed. It was described by Lord Macnaghten as "a sort of index or chart".[6]

One of the main difficulties with the present charity law is the need to find an analogy with an ancient and obsolete statute. The courts must have regard to what Queen Elizabeth's legislators laid down 388 years ago, so it is not suprising that the courts have sometimes failed to adapt to changing social needs and circumstances. Since 1601, society and ideas have changed utterly . Not only is the law tied down to these analogies but it also has no expressly formulated policy or principle to guide the court in its decision. The result has been a tangle of anomalies, strained analogies and general confusion. In many cases the decisions are based on unjustified rules and verbal subtleties rather than on any recognised principle. Many writers have suggested that a re-definition of charity should be sought. Foster J. said in *Incorporated Council of Law Reporting for England and Wales* v *AG*:[7]

> "I find it incredible that the law on this subject is still derived from the preamble to the Statute of Elizabeth I, long since repealed and long since out of date, and in modern times applied by analogy upon analogy. It is time this branch of the law was reconsidered, rationalised and modernised."

B RELIGION

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6 Above n 3, 581.

7 *Incorporated Council of Law Reporting for England and Wales* v *AG* [1971] Ch 626, 647.

The advancement of religion is now considered a charitable purpose, although for historical reasons the preamble to the 1601 statute only indirectly mentions religion by its reference to "the repair of churches".[8] The law has now come a long way from the 1601 statute and is prepared to recognise as charitable the advancement of some strange beliefs.[9] The analogies with the preamble are becoming increasingly strained.

I Technical Inconsistencies

The confusion in this area of the definition of charity may be appreciated by taking a few examples of some decisions on the matter. A gift in England "to the Roman Catholic Church, for the use thereof" has been held charitable.[10] Yet a gift for "Roman Catholic purposes in the parish of Coleraine and elsewhere" was held void for being too wide.[11] A gift "To his Eminence the Archbishop to Westminster Cathedral London ... for purposes as he shall in his absolute discretion think fit" was held charitable. However in Ireland a gift to the Pope to use and apply at his sole and absolute discretion in carrying out sacred office" was held void.[12] The judge in that case held that the Pope has functions which were not charitable. In

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8 The historical reasons for not including religious purposes were based on the eigthteenth and nineteenth century attempts to establish a uniformity of religious beliefs and the desire to avoid the intervention of variable religions according to the pleasure of suceeding princes. The historical reasons are discussed more fully by Moore "Readings upon the statute 43 Elizabeth" in Duke, Law of Charitable Uses (1676) 131, 132.

9 *Thornton* v *Howe* (1862) 31 Beav 14.

10 *Re Schoales* [1920] 2 Ch 7.

11 *MacLaughlan* v *Campbell* [1906] 1 IR 588.

12 *Re Moore* [1919] 1 IR 316.

Australia a gift for "religious uses or purposes" was held void because the words came after a gift for "charitable uses or purposes" and the judge thought the testarix had made a distinction. In New Zealand *Re Clark*[13] deals with a gift of £50 a year to the wife (if any) of the minister from time to time of the Featherston Presbyterian Church to be used by her for her own private use. The judge held it not charitable regarding the possible effect of promoting recruitment to the ministry as too remote. However the judge said:[14]

> "I confirm that I would like to uphold this particular gift if I could consistently with authority for ... the object is ... a most worthy one. However, I have been forced to the conclusion that the gift fails."

This leaves one wondering what it was the judge considered worthy. Whether its worth was because of the advancement of religion or for some other purpose beneficial to the community it seems odd that the judge could not hold it charitable. In *Re Touchet*[15] a Canadian case, the court in giving judgment on a gift to a bishop commented:

> "A recent author, Keeton in The Modern Law of Charities 1962 pg 65, has commented that this branch of the law of charities is suffering from over technicality. I join with others who have said that they do not wish to add to it."

II Neutrality

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13 [1961] NZLR 635.

14 Above n 13,642.

15 (1963) 40 DLR (2d) 961.

The law makes no distinction between one sort of religion and another. For example trusts for the advancement of Hindu, Sikh, Islamic and Buddhist religions have been registered as charitable.[16] The law also assumes that any religion is at least likely to be better than none.[17] There are two concerns with this type of approach. The first concern is that charitable status is given to religious cults (such as the Divine Light Mission in England[18]) which are obscure and sometimes dangerous movements. Some of these religious cults have an influence on their adherents which is tantamount to brainwashing. The difficulty seems to be that the judges are so concerned with not weighing up the merits of one religion with another that they are neglecting the fundamental question of public benefit. *Pemsel's* ~~fourth~~ third category is the advancement of religion, but that does not mean that advancement of any religion is charitable. The element of public benefit still has to be satisfied.

The second concern about the approach the courts are taking is that it allows the advancement of foolish opinions to be granted charitable status. One example of this is the case of *Re Watson*[19] where Plowman J upheld a trust for the publication and distribution of religious writing of no intrinsic worth. *Thornton* v *Howe*[20] is another example. In this case a trust for the publication of the writings of Joanna Southcote,

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16 See "Charities: A Framework For The Future" British government White Paper, presented to Parliament by the Secretary of State for the Home Department May 1989, 7.

17 *Gilmour* v *Coates* [1949] AC 426, 457-458, per Lord Reid.

18 House of Commons Parliamentary Papers 23 1974-75, 387.

19 [1973] 1 WLR 1565.

20 Above n 9.

who claimed that she was with child by the Holy Ghost and would give birth to a new Messiah, was granted charitable status. The judge thought that Joanna's views where decidedly odd but said that a religious trust would be charitable if:[21]

> "...the tendency were not immoral and although this court might consider the opinions sought to be propagated foolish or even devoid of foundation."

One wonders where the question of public benefit came into the judge's decision. Did he actually consider the propagation of foolish views devoid of foundation as being for the public benefit or has the insistence that the law stand neutral as between religions led to a situation where the public benefit element is no longer so significant? The judge did of course point out that the religious tenents must not be immoral if the trust is to be charitable, but it is wrong to assume that merely because a trust is not immoral that it is necessarily for the public benefit.

It has been suggested that these problems would be solved if charitable status were removed from all trusts which are established to advance religion.[22] This seems both unnecessary and undesirable. Many religious organisations are clearly regarded as charitable by both the layperson and the law. A more sensible approach would be to reaffirm the public benefit element as the basis of charitable status. This approach is disscussed more fully in the final part of this paper which

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21 Above n 9, 19

22 Above n 16, 8 where the White Paper discusses the possibility of excluding religious organisations from the definition of charity but concludes that this would be undesirable.

deals with the redefinition of charity. If this approach were adopted, dangerous religious cults and the advancement of foolish opinions devoid of foundation would not be granted charitable status.

There is a further concern about the claim that the law is neutral as between religions. This concern is not that a neutral approach will allow too many religions to be granted charitable status but rather that the claim of neutrality is a false claim. Michael Blakeney expresses this opinion in his article "Sequestered Piety and Charity - A Comparitive Analysis."[23] He argues that contrary to its avowed policy of even-handedness, the law relating to charities exhibits a Protestant bias. What the argument amounts to is that there is a Protestant bias in requiring a charity to be proved to be for the public benefit. The article, however, fails to explain what it is that is charitable about a trust which is not for the public benefit and why such a trust should be encouraged . It may be that the modern concept of charity is a Protestant concept because it has public benefit as its essence. If this is the case it is the meaning of the word and not the bias of the courts which leads to the requirement of public benefit.

III Humanism

It has been suggested that humanism and possibly other athiest and agnostic philosophies should be upheld as charitable trusts.[24] It would be hard to fit these into *Pemsel's*

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23 (1981) 2 Journal of Legal History, 207.

24 See Scott Trusts (3rd ed) para 377; Goodman Report (1976) 23 para 53.

"advancement of religion" category. If religion means a system of faith then perhaps it can be argued that humanism is a religion, because it involves faith in the importance of common human needs and an abstention from profitless theorizing. However if, as is more likely, religion means the human recognition of superhuman controlling powers and especially of a God, then humanism does not qualify as a religion. Humanism is the belief in man as a responsbile and progressive intellectual being. It specifically rejects the belief in a God of any kind. In *Re South Place Ethical Society*[25] the view that a system of belief which did not involve faith in a diety could constitute a religion was rejected. However the position of Buddhism was deliberately left open. Buddhism is generally accepted by society as being a religion but it may not involve a belief in God.

There is also the possibility of classifying humanism as charitable under the fourth head in *Pemsel's* case; ie "other purposes beneficial to the community". The problem with this is that the category is still tied down to analogies with the 1601 preamble. There is no mention of humanism or any such related thing in the preamble. However, some of the analogies in present day cases are so remote that this may not pose a problem, and in any case it is arguable that the law of charities should not be tied down to such an ancient and obsolete Act. Another difficulty is that the courts are unlikely to consider humanism as being for the public benefit. In *Bowman*[26] Lord Parker seems to suggest that a trust for a society with

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25 [1980] 1 WLR 1565.

26 [1917] AC 406.

humanist objects would not be charitable. H Picarda in his textbook[27] "The Law and Practice Relating to Charities" expresses the opinion that humanism should not be granted charitable status. His first reason for saying this, is that humanism is adverse to the very foundation of religion so cannot be for the public benefit. In an age where intellectual freedom is valued it seems odd to dismiss all possibility of humanism being for the public benefit just because it involves a belief system with no God. The principle of giving to others can be just as strong in a humanist trust as in a religious trust. Some humanist trusts involve principles which promote the highest social, moral and domestic standards.The public benefit in such a trust would seem a lot clearer than the public benefit in propagating foolish views devoid of foundation.

The second reason that Picarda puts forward for denying humanist trust charitable status to humanist trusts is based on his belief that such a trust would be political. Objections to denial of charitable status on such grounds are discussed in section of this paper which deals with political activity.

The presumption is that any religion is better than none, but at times the law seems to have lost track of why this is so. The reason religion is usually charitable is because it is part of the ethics of most religions to encourage man to want to give. Religion can therefore be a fundamental source of charity and advancement of religion is certainly for the public

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27 Hubert Picarda *The Law and Practice relating to Charities* (1977), 57.

benefit.[28] What needs to be asked more, is not whether a particular organisation is religious but whether it is for the public benefit regardless of whether one may like to label it as a religion or not. The inconsistencies, and difficulties then become managable because they are contained within a general principle rather than a mass of confusing decisions.

C SPORT AND RECREATION

The legal definition of charity in relation to sport and recreation provides yet another example for the law's antique and unsatisfactory qualities in relation to the definition of charity.

I Mere Sport

Since 1895, it has been accepted that a trust for the encouragement of sport or games does not fall within the boundaries of a legal charity. This was made clear in *Re Nottage*[29] where Lindley, in considering a gift to provide an annual prize for yacht racing, stated:[30]

> "Now I should say that every healthy sport is good for the nation - cricket, football, fencing, yachting or any other healthy exercise or recreation, but if it had been the idea of lawyers that a gift for the encouragement of such exercises is therefore charitable, we should have heard of it before now."

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28 c.f *Gilmour* v *Coates* [1949] AC 426 where a religious trust did not involve *advancement* of religion. The case involved a gift to a closed religious order of purely contemplative nuns and was held not to be charitable.

29 [1895] 2 Ch 649, 655.

30 Above n 29, 655.

And he added for good measure "I deal with the present case on the broad ground that I am not aware of any authority pointing to the conclusion that a gift for the encouragement of a *mere sport* can be supported as charitable".[31] Similarly the promotion of angling,[32] fox hunting,[33] swimming and ahtletics[34] have been held not to be charitable objects.

There are however exceptions made to this general rule. A gift made to encourage sport is charitible if made to the army[35] or as an adjunct to religion.[36] The most important exception is if the promotion can be shown to be not an end in itself, but is part of some wider educational purpose. Then the trust will be charitible. So, in *Re Mariette*[37] Eve J decided that a gift of £10,000 to provide squash courts for Aldenham School was charitable. He commented that "no-one ... can be properly educated unless at least as much attention is given to the development of his body as is given to the development of his mind."[38]

The question arises as to why sporting and recreational organisations are largely denied charitable status. There really does not seem to be any difference between promoting

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31 Above n 29, 656.

32 *Re Clifford* [1912] 1 Ch 29.

33 *Re Thompson* [1934] Ch 342.

34 *Laing* v *Commission of Stamp Duties* [1948] NZLR 154.

35 *Re Gran* [1925] 2 Ch 362.

36 *Commissioner of Valuation for Northern Ireland* v *Trustees of Fisherwick Presbyterian Church* [1972] 2 Ch 284.

37 [1915] 2 Ch 284.

38 Above n 37, 288.

for example, football, through a school, university, religious organisation or the army and promoting it by some other means. What should be important is the end not the means, the substance and not the form. One wonders why some of these trusts could not fall under the fourth head of charity (other purposes beneficial to the community). Of course, as with all legal charities, the object of the trust must be within the spirit and intendment of the preamble to the 1601 Act. It is not unreasonable to suppose that sport could have been a purpose intended by the draftsman of the Elizabethan Statute, if he had been aware of the changes which have taken place in society since 1601. In any case, the courts have already in many cases stretched the connections with the 1601 Act. Furthermore as has already been pointed out, tying the definition of charity to an ancient and obsolete statute seems a pointless requirement.

For a trust to succeed it must be for the public benefit. This does not seem particularly hard to satisfy with many sporting trusts. Of course if a sporting trust is particularly frivolous or dangerous then it will naturally not be charitable. However, on the whole, sport and fitness are highly desirable objects. As Picarda points out in an article on sporting charity:[39]

> "...dieticians, medical opinion and glamourous Hollywood women of a certain age are all agreed that sensible physical exercise is the key to health and happiness. 'A healthy mind in a healthy body' as a maxim is now accepted not only by the independent sector in education but by people from all walks of life. The fact that *some* fitness fanatics are incidentally

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39 Hubert Picarda "Sporting Charity" (1988) supplement number 52 New Law Journal - Annual Charities Review iv.

deviants proves nothing. Physical recreation is in general a thoroughly good thing."

What is even more significant in regard to the question of public benefit is that the cases themselves actually admit that sporting trusts can be for the public benefit. Lindley L J in *Re Nottage* acknowledged that "every healthy sport is good for the nation"[40] and Lord Wright in *National Anti-vivisection Society* v *IRC* [41]admitted that "healthy and manly sports are certainly, in fact, beneficial to the community ..."

Society is increasingly concerned to extend and increase the use and improvement of recreational and sporting opportunities. The law of charities has failed to reflect these changes in society's views and needs.

II Recreational facilities

In *IRC* v *Baddeley*[42] the House of Lords threw considerable doubt on whether recreational facilities could ever be charitable, if the education, poverty, or incapacity of the beneficiaries is not the prime consideration of the donor. The outcome of the *Baddeley* case in England was the Recreational Charities Act 1958. The legislation was substantially copied in New Zealand in the Charitable Amendment Act 1963 which

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40 Above n 29, 655.

41 [1948] AC 31, 42.

42 [1955] AC 572.

inserted s61A into the Charitable Trusts Act 1957.[43] Both jurisdictions confirmed the long-time supposition that community centres and village halls for the public at large, or sizeable sections of the public do have a charitable character. The legislation provides that it shall be and be deemed always to have been, charitable to provide facilities for recreation or other leisure-time occupations, if the facilities are provided in the "interests of social welfare."

The English courts have unfortunately taken a restrictive approach to the legislation. As Alan Hutchinson commented in an article on this topic; "... the energies of reform, at hand in bringing about the 1958 Act, have been effectively dissipated by judicial timidity and reticence".[44] The matter hinges around the words "social welfare". The 1958 Act states that for the requirement of "social welfare" to be met the facilities must be provided with the purpose of improving the conditions of life for the persons for whom the facilities are primarily intended and either:

1 Those persons have need of such facilities by reason of their youth, age, infirmity, disablement, poverty, race, occupation, or social and economic circumstances; or

2 The facilities are to be available to the members or female members of the public at large.

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43 See *Morgan* v *Wellington City Council* [1975] 1 NZLR 416 where the court had to consider a gift of land upon trust for the purposes of public recreation and enjoyment to a city corporation for the benefit of the citizens of Wellington city. The court held this trust to be charitable under section 61A of the Charitable Uses Act 1957.

44 Alan Hutchinson "Recreational Charities - A Change of Tactics Required?" (1978) Conveyancer 355, 360.

The timidity of the courts can be seen by the interpretation, that the court gives to these provisions in *Inland Revenue Commissioners* v *McMullen*.[45] Here the court had to consider a trust set up by the Football Association to provide facilities which would enable and encourage pupils at schools and universities in any part of the United Kingdom to play football or other games or sports and so ensure that due attention was given to the physical education and development of such pupils as well as to the development and occupation of their minds. It was held by the majority of the Court of Appeal that the trust was not charitable.[46] It was held that "social welfare" indicated some kind of deprivation which needed to be alleviated and since the pupils were not deprived, the trust did not satisfy the requirements of the Act. Such arguments are difficult to accept since the Act itself states that the "youth" of the persons for whom the facilities are primarily intended constitutes a sufficient social need. Hutchinson rightly points out that the reasoning of the court can only render the Act useless and impotent.[47]

The more important point in regard to the English and New Zealand statutes is that they have merely drawn attention to one small difficulty in the legal definition of charity. They merely aim to set to rights some of the implications of an unfortunate decision. They are examples of a patchwork approach to the problem of the legal definition of charity

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45 [1979] 1 WLR 130

46 The Court of Appeal's decision was reversed by the House of Lords on other grounds with the consequence that the effect of the Recreational Charities Act 1958 was not in issue. See [1981] AC 1.

47 Above n 44, 361

rather than an approach aimed at effecting some real measure of reform.

D Politics

One of the rules which judges have developed in respect of the definition of charities is that political purposes are not charitable. The rule is a blanket one,[48] and no inquiry is permitted into whether the purpose falls within the spirit and intendment of the preamble to the Charitable Uses Act nor is an inqury permitted into the benefits which the activity may bestow on the public. Political activity is simply made the basis for refusing charitable status. The problem with this feature of the legal definition is that none of the reasons given for this blanket rule adequately justifies its existence. In all other areas of charity law the same tests are applied; i.e consideration is given to the preamble and to questions of public benefit. Regardless of any consideration into whether these tests need clarifying or improving, the fact still remains that no good reason has been given for treating political purposes any differently from other purposes in charity law. It has been said that the courts have arbitarily invented a non-existent law.[49] This section of the paper examines some of the cases on this rule and the reasons given for the rule. Consideration is given as to whether these reasons justify the exclusion of all political purposes from the definition of charity.

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48 The only exception to the rule, is if the political purposes are ancillary to some other charitable purpose. The limits and difficulties to this exception are discussed later in this section.

49 See the English Charity Law Reform Commitee paper "Charity Law - Only a new start will do" (1975)

I Some of the cases

Political parties

Many cases have held that groups which have the purpose of supporting a political party are not charitable. In *Re Hopkinson*[50] a trust to advance adult education on the lines of the Labour Party's memorandum "A Note on Education in the Labour Party" was held to be political and therefore not charitable. In *Re Bushnell*[51] a trust for "the advancement and propagation of the teaching of socialised medicine" was held to be political and therefore not charitable. In Australia a gift for the Communist Party of Australia for its sole use and benefit was held to be void because its purposes were not charitable.[52]

Peace and international understanding

In *Anglo-Swedish Society* v *IR Comrs*[53] the promotion of closer and more sympathetic understanding between English and Swedish peoples was held to be not charitable because "it was a trust to promote an attitude of mind, a view of one nation by another." In *Buxton* v *Public Trustees*[54] a trust to promote the improvement of international relations and intercourse was held not charitable. More recently however, in

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50 [1949] 1 All ER 346.

51 [1975] 1 All ER 721.

52 *Bacon* v *Pianta* [1966] ALR 1044.

53 (1931) 47 TLR 295.

54 [1962], 41 TC 235.

Re Koeppler [55]it was held that a gift to fund a series of academic conferences for members of the Organisation for Economic Co-operation and Development who were influential in social, political and economic matters in their own countries was held charitable. The purpose was for promotion of greater co-operation in Europe and the West. It was held that the trust was educational in character and for the public benefit and that political matters could be touched on at the conferences without affecting its charitable status.

Changes in the law

Another group of cases involves organisations whose object is to change the existing law. In the *National Anti-Vivisection Society*[56] case the House of Lords held the anti-vivisection society not charitable on two grounds. First, vivisection was for the public benefit therefore to abolish it was not. Secondly, a main object of the society was the repeal of the Cruelty to Animals Act 1876 and the substitution of a new enactment prohibiting vivisection altogether. This main object was political and therefore the society was held political and not charitable. Lord Porter dissented from this conclusion. In his view an object was only political if it necessitated a change in law; if the desired purpose could be achieved by persuasion and not by a change of law ,then it was not political.

Changes in the law of foreign countries

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55 [1985] 2 All ER 869.

56 [1948] AC 31.

As an extension of the above category, it was held in *McGovern* v *Attorney General*[57] that a trust whose object is to secure alteration in the laws of a foreign country will fail because of its political nature. Similarly Amnesty International has been denied charitable status.

Opposing a change in the law

In *Molloy* v *Commissioner of Inland Revenue*[58] the New Zealand Court of Appeal had to consider a gift made to the New Zealand Society for the Protection of the Unborn Child (SPUC). The SPUC were advocating the maintenance of abortions laws which the Abortion Law Reform Association were attempting to liberalise. This is the first case where the advocacy of maintenance of the law was at issue as compared to advocacy of a change in law. The court regarded the former just as political as the latter and the gift was accordingly held to be non charitable.

II Political purposes which are ancillary to main purposes

In most of the cases the rule that political purposes are not charitable has been applied so that if a group is involved in any political activities it is not granted charitable status. The courts have usually been very reluctant to be seen to endorse any political purpose. However the case *Re Koeppler* [59]shows an approach which looks at the dominant purpose to determine

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57 [1982] Ch 321.

58 [1981] NZLR 688.

59 Above n 55.

whether the group is charitable. In this case the political purposes were seen as merely ancillary to the dominant purpose which was considered by the court to be educational and therefore charitable. This approach is commonly taken by the courts in the United States.[60] Lord Normand and Lord Porter in the *National Anti-Vivisection Society*[61] case also recognised that the existence of some political motive is not necessarily fatal.

This approach leads to inconsistencies in the cases because of the difficulty in determining what the dominant purpose and what the ancillary purpose of a particular group is. In many of the cases where the court has held a trust to be political and therefore non-charitable it could be argued that political purposes were actually ancillary to some other dominant purposes. For example, in the *Anti-Vivisection Society* case the main purpose could be seen as prevention of cruelty to animals and in *Molloy* the main purpose could be seen as the prevention of abortion. In both these cases the purpose of seeking maintenance or alteration of the law could be argued to be ancillary to these main purposes, because it is merely a means of achieving an end. The distinction between ancillary and dominant purposes has caused considerable difficulties for charities involved in relief of poverty abroad. They have not been content to limit their activities to alleviating poverty directly, believing that more could be achieved by attacking the underlying causes of poverty which may lie in the social structure of the countries concerned or in the policies of their

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60 See for example *Vanderbilt* v *Commissioner of Internal Revenue*(1937) 93F 2d 560.

61 Above n 41, 55, 76.

governments.[62] In doing this they have often endangered their charitable status.

III Reasons given for political purposes not being charitable

Propaganda

One reason for the courts denying political purposes charitable status is that it is not for the public benefit to have pressure groups , propaganda campaigns, lobbying and the supply of distorted information which make independent judgment difficult.[63] There are two problems with this reasoning. First there is a fine line between propaganda and education. Sheridan put it this way:[64]

> "There is a thin line, difficult to discern and possibly without great legal significance, but there all the same, between trying to convert people to a point of view and informing them of its existence and of the reasons for it; between propaganda and education."

The second problem with this reason is that it does not justify the denial of charitable status to all political activities. Not all political activities involve corrupt lobbying and the supply of distorted information. It may be charitable to advocate change in the law by putting forward suggestions on the basis of reasoned argument, but not charitable to put one's

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62 Elizabeth Cairns makes this point in her book; *Charities: Law and Practice*, 22.

63 Above n 50.

64 Sheridan "The Political Muddle - A Charitable View?" (1977) 19 Mal LR 42, 70.

viewpoint forward by resorting to coercive techniques such as threats and bribes. The question should still be asked in respect of each particular case whether there is any benefit to the public.

The court should expound laws as they stand

Another reason given for political purposes not being charitable is that the court on deciding whether a trust is charitable must decide on the principle that the law is right as it stands, since to do otherwise would usurp the functions of the legislature.[65] This reason is not very convincing when one considers that judges themselves change the law from time to time in their departing from precedents and in distinguishing and overruling decided cases. According to Rickett; "the whole essence of the common law is that judges participate over and are engaged in the development of the law *by change*."[66] Lord Atkin in *Donoghue* v *Stevenson*[67] was breaking new ground, if judges did not make such decisions and never took any notice of changing social conditions it would result in the stultification of the law.[68] This reason does not, therefore, seem adequate as a basis for denying charitable status to political trusts.

No sufficient means of judging public benefit

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65 Above 2, 336 and see Tyssen on *Charitable Bequests* (1898 ed at 176).

66 Charles Rickett, "Charity and Politics" (1982), 10 New Zealand Universities Law Review, 169, 172.

67 [1923] AC 601

68 See further L A Sheridan "Charity versus Politics", (1973), 2 Anglo-American Law Review, 47, 57.

A further reason the courts have given for political purposes not being charitable is given by Lord Parker in *Bowman*[69] and applied in the *Anti-Vivisection*[70] case and in *McGovern*[71], Lord Parker said: "... the court has no means of judging whether a proposed change in the law will or will not be for the public benefit. . . ".[72] This is a strain on credulity. In all other areas of charity law judges must make a decision on the question of public benefit,[73] why should political trusts be any different? The law arbitrarily discriminates against many worthwhile enterprises only because of the alleged difficulties in judging public benefit. Public benefit is often a difficult question to decide but the court should have a duty to consider the question on the evidence available. Nobles suggests that the rule against political purposes being charitable is merely a formula for allowing the courts to avoid adjudicating on issues regarded as controversial or political.[74]

The argument becomes even less convincing in light of the fact that in some of the cases involving political purposes, the courts do in fact make a judgement on public benefit. In the *Anti-Vivisection* case the court did clearly make a judgment that vivisection was for the public benefit. In *Molloy* Somers J concluded that the public good in restricting abortion was not

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69 Above n 26, 4.

70 Above n 41.

71 Above n 57.

72 Above n 26, 4.

73 Harvey Cohen makes this point in "Charities - A Utilitarian Perspective" (1983) Current Legal Problems, 241, 255. He points out that this is particularly so in the fourth class of Lord Macnaghten's classification.

74 R Nobles "Politics, Public benefit and Charities" (1982) *Modern Law Review*, 704, 707.

so self evident as to achieve such charitable pre-requisite.[75] He seems to be making the kind of judgment that Lord Parker claims is impossible to make.

In respect of some issues it is hard to believe that the court has no means of judging the public benefit. For example promotion of a change in laws which permit slavery or torture or cruelty to animals can surely be classed as within the spirit of the preamble to the Charitable Uses Act and as being for the public benefit. It is obviously more difficult when the issue is a more controversial one, for example issues such as abortion or fluoridation of water. However in these cases too, the court should have a duty to decide the question of public benefit, and this includes considering the benefit gained from the fostering of public debate about important issues in society. As Rickett rhetorically asks in relation to the *Molloy* case : [76]

> "Is there not some considerable public interest in fostering a full and committed debate on the issue of abortion? Is there not some considerable public interest in fostering any interest that people take in the law and its content?"

Public debate provides an opportunity for an exchange of ideas and it keeps governmental authorities abreast of the varied and complex issues coming before them. There is however a danger that in some cases only one viewpoint would

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75 Above n 58, 697.

76 Above n 66, 171 also the same point is made by R B M Cotterrell in "Charity and Politics" (1975) Modern Law Review, 471, 474.

be aired publicly. [77] However this does not mean that the privileges of being a charity would be operating to favour one side in a controversy. The public benefit would exist as long as both sides of the debate had the *opportunity* to be aired publicly.

Political Impartiality

One reason for denying political activities charitable status, which is often referred to in cases involving promotion of a particular political party, is that judges do not want to prejudice their reputation for political impartiality.[78] They do not want to be seen to be getting involved in any way in the workings of the political system. This however is not a reason for charity and politics being incompatible but rather a reason for why judges do not want to be involved in the task of selecting those political purposes which are compatible with charitable principles and rejecting those which are not. In actual fact the court need not make a decision on the worth of the particular political cause if it decides that the public benefit derives from the public debate on controversial issues. In any case, judges do make political, moral and social judgments in many of the cases they decide in other areas of law.

The cases do not give satisfactory reasons for the rule that political purposes are not charitable. There is a distinct

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77 This point was made by Elias clark in his article "The Limitation on Political Acitivities: A Discordant Note InThe Law of Charities" (1960) Virginia Law Review 439, 458.

78 Above n 53, 237.

judicial reluctance to analyse the policy issues underlying the rule. The rule at present is basically a blanket approach against political purposes. It is an excuse given by the courts so that they can avoid dealing with political matters.

Charities with political involvement are often motivated by a desire to serve mankind. No adequate reason has been given as to why they should be denied privileges which are given to religion, the arts and education which also seek to serve mankind in differing ways. As Clark points out the only difference is that the former aims its message directly to government which often leads to the most immediate solution to society's problems.[79] Real change in the world *is* highly political and as Susan Bright comments in her article "Charity and Trusts for the public Benefit - Time for a Rethink":[80]

> "They [the Charity Commissioners] state, for example, that charities must avoid "seeking to eliminate social, economic, political or other injustice" surely this is the essence of what most people would regard as charitable activity!"

Regardless of whether the present tests in respect of the legal definition of charity should be improved or not, it is desirable to apply a definition to every case on its facts. It may be that by this process, many political purposes will fail, but they should only fail after all the evidence in each situation is looked at and considered in the light of the definition of charity. As the present definition of charity

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79 Above n 77, 452.

80 Susan Bright "Charity and Trusts for the Public Benefit - Time For a Rethink" (1989) The Conveyancer, 28, 32.

stands, adequate justification has not been given for the denial of charitable status to political purposes.

Judges do not want to deal with political matters. This is probably because they fear that it will result in prejudice to their much hallowed impartiality. If judges are so unwilling to consider issues of charity and politics then perhaps the law ought to allow a different body of persons to make these judgments.

E EDUCATION

The advancement of education has always been considered to be charitable in the legal sense. The 1601 preamble refers to "the maintenance of schools ... and scholars in universities" and "the education and preferment of orphans". The scope of educational activities upheld as charitable has been extended well beyond these purposes. For example research and information services, which are considered to be for the public benefit, are held charitable under the head of education.[81] Yet again the analogies with the 1601 statue have been stretched further and further, which makes one wonder why the 1601 preamble is retained as part of the law of charity.

The main problems with this area of the definition appear to be on the fringes of the definition of education and have largely been dealt with in the sections on sport and politics. For example why is a set of squash courts educational if it is given to a school but not educational if given another section

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81 *Re Hopkins Will Trust* [1965] Ch 669.

of the community? and why is a trust which aims to inform people about socialised medicine not considered education?

In the area of sport it has been argued that trusts to encourage the physical education and development of school pupils are educational and thus charitable. In *Re Mariette*[82] the court upheld a gift of this nature as charitable. The gift was £10,000 to provide squash courts for a particular school and the court considered this promotion of physical development as an educational purpose in just the same way that promoting development of the mind would be. However in the more recent case *Inland Revenue Commissioners* v *McMullen*[83] the majority held a trust to promote physical education and development by enabling and encouraging pupils at schools and universities in any part of the United Kingdom to play Football or other games or sports, as non-charitable. The majority interpreted the purposes of the trust as connoting the promotion of something which a young man acquires when playing such games as association football and that whatever that something may mean it has nothing whatever to do with education. *Re Mariette* was distinguished on the grounds that it involved a gift to an institution which was a school and so could be enjoyed as part of the curriculum of that school and was therefore educational because it was for the purpose of the school. But this did not seem to be the emphasis in *Re Mariette* at all. In fact the reasoning in *Re Mariette* could well be applied to the facts of *McMullen* and lead to the conclusion that the trust was to ensure that as much attention is given to

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82 [1915] 2 Ch 284.

83 [1979] WLR 130.

the development of pupils' bodies as is given to the devlopment of their minds and this seems to be why Eve J held the gift of squash courts to a school as charitable. In *McMullen* Bridge L J, the dissenting judge, took this view. He argued that organised sporting activities play an important part in the overall education process. Therefore, since the purpose of this trust is to promote physical education and development so as to ensure that the physical side of education is not neglected, and the beneficiaries are all persons engaged in any formal education process, then the trust is clearly for an educational purpose. The approach of Bridge L J seems to be greatly preferable.

The problem in this area of charity law, seems to be that the arguments are all about the meaning of the word education. What really needs to be done is to step back and ask whether the trust is "charitable" even if it is not educational. The only option under the present definition of charity would be to consider the trust under the fourth head of *Pemsels* case; ie; "purposes beneficial to the community". But this fourth head is limited by the need to find an analogy with the 1601 preamble. And no general principle has been developed which explains why an analogy needs to be found and what it is that all the analogies will then have in common. There is no explanation of any common thread, no single principle one can refer to to decide whether a particular purpose should qualify as charitable. So the court is left to debate endlessly about what is and what is not educational and in doing so are probably subconsciously or otherwise doing so on the basis of their notion of what they consider charitable. Some judges probably

prefer it this way, and feel more secure if they are able keep within the limits of the preamble, using it as a kind of safeguard.

F ANIMALS

Trusts for the relief of animals in distress and for the suppression of cruelty to animals are charitable.[84] This is because of the usefulness of animals to mankind (in the case of domestic animals) and because it is good for mankind to be taught not to be cruel but to be kind to animals.[85]

It is difficult to understand then why a trust for the suppression of cruelty to animals which are human is not also charitable.[86] This benefit to mankind is the cultivation of the finer side of man's nature by discouraging his innate tendency to cruelty. There seems to be no logical distinction between cruelty to animals and cruelty to other humans.

PART IV : POSSIBLE NEW APPROACHES

A THE PATCHWORK APPROACH

Although wholesale redefinition of charity has not yet been attempted, there have been some attempts to resolve

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84 See for example *Re Wedgewood* [1915] 1 Ch 113.

85 Above n 84, 122.

86 See Above n 57 and also the Charity Commissioners report 1978 23 - 24 para 69 where the Commissioners conseder the Amnesty International Trust.

difficulties in particular areas. For example the Recreational Charities Act 1958 attempted to put to rights the implications of the *Baddeley* case. At first glance it appears that the White Paper on charity legislation, recently producded by the British government, is recommending a patchwork approach to the problem of the legal definition of charity[87]. It is decided in the White Paper that it might be desirable to make one or two minor adjustments to the present law[88] in the areas of religion and political activities. Yet after considering some of the problems in these areas the White Paper actually came to the conclusion that it would not be wise to attempt any changes in the law here after all.[89] The problem with a patchwork approach is that it merely solves a particular symptom of a wider problem. It fails to effect any real measure of reform. The very fact that there is a perceived need to patch up the cracks and fissures which are appearimg in the present law suggests thet there is a deeper problem with the whole definition of charity.

B REDEFINITION

I Is it a good idea?

For many years now it has been debated whether the definition of charity should be reformulated. The preceding sections of this paper illustrate clearly that the legal definition of charity is a mess. It is tied to an ancient statute,

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87 Above n 16.

88 Above n16, 7.

89 Above n 6, 10, 12.

it is complex and tangled and is fraught with decisions which are illogical and capricious. However, some writers still claim redefinition is unnecessary. Sheridan is unconvinced that redefinition is the answer. Professor Keeton[90], Sheridan[91] and Bentham[92] are of the opinion that there is little comfort to be spared from developing a new definition of charity. They argue that we should rely on the social acumen of judges. Although they admit that some periodic statement, preferably by the House of Lords, of broad general principles, upon which cases will in the future be decided, might well be of assistance. But relying on judicial valour to develop the law of charities pragmaticaly against the background of contemporary need has so far been a failure, as JC Brady points out:[93]

> "Judicial pragmatism in our legal system has always been strongly tempered by judicial timidity an conservatism, and this has been demonstrably so in the development of our law of charity".

And as N Bentwich said "We cannot expect judicial interpretation to unravel the judicial knots".[94]

The recent British White Paper deals in part with the issue of redefinition. The Paper concludes that redefinition is fraught with difficulty and might put at risk the flexibility of

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90 GW Keeton "Charity Law in a Muddle" 2 Current Legal Problems (1949) 86,91.

91 Sheridan "The Movement for Charity Reform" (1976) 2 Malayan Law Journal

92 R Bentham "Charity Law and Legislation: Recent Developments" (1962) Current Legal Problems 1159, 162.

93 JC Brady, "The Law of Charity and Judicial Responsivement to changing Social Need" Northern Ireland Legal Quarterly (1976) 198, 203

94 N Bentwich "The Wilderness of Legal Charity" Law Quaterly Review (1933) 520, 526.

the present law. It is incredible that the White Paper can come to this conclusion after admitting that the law's development in this area is;[95] "not always tidy and can sometimes be confusing even to experts,"and then going on to say:

> "It is perhaps not suprising that, as the threads reaching employ become more extended, so the rational for decisions on charitable status should not always be immediately apparent. This has undoubtedly led to a degree of uncertainty about the intepretation of the law which can inhibit innovative bodies from seeking charitable status."

One wonders how the White Paper can acknowledge such major defects and then decide that there are no advantages in attempting to redefine charity. It is not satisfactory to be critical of the present state of the law and then neglect the problem of reforming it. This is a defeatist attitude.

Numerous writers do however feel there is a clear need to redefine charity. As long ago as 1957 Bentwich considered the clearest and simplest remedy for the evil of litigation on charity would be for Parliament to enact a modern definition of charity.[96] In 1953 Fridman[97] expressed the same views and submitted some suggestions for redefinition. In 1975 a paper published by the Charity Law Reform Committee entitled "Charity Law - Only a new start will do"[98] The Committee expresses the view that the law is plainly unsatisfactory and

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95 Above n 16, 6.

96 Above n 94.

97 GHL Fridman "Charities and Public Benefit" (1953) 31 Can Bar Rev 537.

98 Above n 49.

that an entirely new approach is needed. Brady[99] is also in favour of redefinition and regards those who are critical of a new definition as counsel of despair. Judges too have frequently commented on the lack of logic and consistency in the case law.[100]

The legal definition of charity is clearly not satisfactory and it is time for a new definition to be sought.

II What should the new definition be?

The need for reform of the definition of charity seems clear. It is in defining the manner of such reform that difficulty is encountered. It could be argued that since it seems impossible to define satisfactorily what organisations are charitable that it would be easier and fairer if no organisations at all were granted charitiable status.[101] This solution would however, not find favour with most of the public and the government who want to encourage charities. Under this approach even the most plainly beneficial and charitable causes would receive no encouragement. The solution is a defeatist one.

The White Paper discusses three possible approaches for reformulating the definition of charity.[102] It rejects them all. The first approach discussed is to define charity by listing in a statute the purposes which are deemed to be charitable. In a sense the law already has a list of purposes which are deemed

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99 Above n 93, 215.

100 See for example above n 7.

101 See above n 16 where this idea is discussed and rejected.

102 Above n 16, 7.

charitable from *Pemsel's* case. This list, however, is judicially created rather than in statute form. It is also likely that the White Paper is referring to the enactment of a more detailed and specific list of purposes than *Pemsel's* categorisation, especially since the White Paper considers the enactment of *Pemsel's* categories as a separate approach for redefinition. The advantages of such an approach (not mentioned in the White Paper) are that the law would no longer be vague and uncertain and value judgments would no longer need to be made. Some of the disadvantages are outlined in the White Paper. Firstly, it would be extremely difficult to draw up a list which could command a reasonable measure of agreement. However, this could be said of all attempts to define charity. In the case of a list, the disagreements will be based around what should be included in this list. If, for example, a definition were based around public benefit, the disagreement would be about what satisfies the requirement of public benefit. A second disadvantage that the White Paper refers to is that a list would be inflexible and quickly outdated by changing opinion. This a fair criticism and although the law could be kept up to date by amendment by Parliament, this would be highly impractical. The main criticism of the "list" approach is not mentioned at all by the White Paper. This is that the "list" approach fails to address the crucial question. Why are the purposes on the list deemed charitable? In other words the approach does not bring one any closer to elucidating the general principle which determines what is charitable and what is not. The real effect of a list approach is that Parliament would be making the value judgments as to what was charitable. The principles upon which these

judgments would be made would be unknown, moreover if there was some general principle upon which Parliament was deciding which purposes were to be included on the list, there would be no opportunity for newly formed organisations to claim that they should be included on the list according to that general principle. The more detailed and specific the list is, the less ability there is to assess the facts of individual instances and relate them to some broad principle with a view to the object or purpose which one wants to attain.

The second approach which is discussed in the White Paper is the enactment of a definition of charity based on *Pemsel's* classification. The White Paper states that this would be scarcely less difficult than the "list" approach. There is no explanation of why it would be so difficult. The next comment in the White Paper is that as a classification the formulation has proved of enduring use but as a definition its advantages are much less compelling. It is difficult to understand quite what this comment means. If the classification is to be enacted it will remain a classification, that is its nature. If it is somehow to be changed, the White Paper does not explain how. There is also no explanation of whether the enactment of *Pemsel's* classification would include the need to refer to the 1601 preamble. The White Paper then highlights the disadvantages of such an approach. Namely, that if the enactment of the classification failed to preserve the present case law, the law would be thrown into confusion and uncertainty by depriving the courts of recourse to previous decisions when they were asked to interpret the new statutory provisions. This however, is not necessarily so. The judges

would be required to perform a simple statutory interpretation exercise. Without the confusion of the present case law and the necessity to find an analogy with the 1601 preamble, the result could well be a lot less confusing and uncertain. The White Paper then goes on to say that if, on the other hand, the enactment of *Pemsel's* classification did successfully preserve the present so called "valuable" case law, it is hard to see what the new definition would achieve. This is an obvious conclusion, since then the definition of charity would remain the same, *Pemsel's* classification as guideline (albeit now in a statute), reference to the ancient preamble and the mass of case law all still intact. There would, in fact, be no *new* definition at all so it is odd that the White Paper considers this option in terms of a possible redefinition.

The third option for redefinition which is discussed in the White Paper is to define charitable purposes as purposes beneficial to the community. This option is again opposed by the White Paper . It is acknowledged in the White Paper that the approach would have the advantage of being simple, but then the disadvantages of such an approach are discussed. The main criticisms made in the White Paper are that such a definition would allow organisations not obviously for private benefit or profit to be admitted as charitable, that it would be too subjective and would expand the ambit of charity too far. I will deal with each of these criticisms in turn.

To start with it is completely erroneous to say that such a defintion would allow organisations not obviously for private benefit or profit to be held charitable, There are many

organisations which are not for private benefit or profit but which would still not satisfy the requiremnt of being beneficial to the community. For example, a dangerous and immoral religious cult may not make a profit or be obviously for private benefit but it would not be held charitable under the "purposes beneficial to the community" test.

The second criticism made of this approach is that it would be too subjective, but this criticism could equally be made about the present law. *Pemsel's* fourth catergory involves exactly the same question as are the purposes beneficial to the community? The only difference is that decisions made under *Pemsel's* fourth category must be made with reference to the 1601 preamble. This has not made the decisions any less subjective, it has just made them more confused and artificial, as the analogies with the preamble become more and more strained. The subjective question of public benefit must also be applied to the other three categories in the *Pemsel* classification. So it is unfair to disregard this reformulation on the basis that it is too subjective when the present law is just as subjective. In any case it is better to argue out subjective decisions within the framework of a clear enunciated principle rather than clouded in a complex and sometimes illogical definition still tied down to an 388 year old statute. Moreover, if the idea of drawing up an exhaustive list of charitable purposes is to be rejected as too rigid and liable to be outdated too quickly, then one has to accept that a flexible defintion which can adapt to the changing views of society, must involve some kind of subjective decision. In admitting that the concept of charity changes with time, one is admitting that charity itself is a somewhat subjective term. It must then decided whether

Parliament should make the subjective decision and lay down a list of organisations and purposes it considers charitable or whether it is preferable to leave the subjective decision to the judiciary or some other body. They can then make decisions on the basis of some general principle such as "the purposes must be beneficial to the community". The latter seems to be the more desirable approach. That way each case can be dealt with on its individual facts and the decisions can easily adapt to changing social needs. There is nothing wrong with leaving these types of decisions to judges. They have been making value judgments for years. They make a value judgment every time they decide what is reasonable, obscene or unconscionable, as long as they have a clear general principle to guide them, then we must rely on their social acumen to make appropriate decisions.

The third criticism the White Paper makes about defining charitable purposes as purposes beneficial to the community is that it would greatly expand the ambit of charity in ways which would be far from desirable. The first response to this criticism is that it may not be true. The present definition of charity is to a large extent based on the requirement of public benefit so there is no reason to believe that this test of "purposes beneficial to the community" will greatly expand the ambit of charity. The second response to the criticism is that if the ambit of charity is to some extent expanded by this definition then that is a good thing. It is fair to say that if a purpose *is* beneficial to the community then it is charitable and deserves the privileges that government endows on charities. If that organisation has failed to be admitted as charitable

under the present law then it can really only be because it failed to be analogous to one of the purposes in the 1601 preamble. Otherwise it would have fallen into *Pemsel's* fourth category of purposes beneficial to the community. It is unreasonable to deny an organisation charitable status merely because it is not analogous to an ancient and obselete statute which is largely irrelevant in this day and age. The expansion of charity would also put into practice the old legal maximum that the law favours charity - not as a subject of suit, but rather as purpose to be maintained[103].

The White Paper then goes on to say that any attempt to make clearer what is meant by "public benefit" might be made by reference to existing case law and by incorporating the other heads of charity into the general formula. Suprisingly the White Paper is not so concerned about "depriving the courts of recourse to previous decisions" as they were in relation to the approach which involved enacting *Pemsel's* classification. Instead they are concerned that incorporating reference to existing case law into this last approach would merely be adding unnecessary detail which would ossify instead of simplify the law. It is true that if all the case law including the necessity to refer to the 1601 preamble was to be referred to when deciding what is for the public benefit then the definition would not have been much altered. However at least there would be overall general principle of "public benefit" or "purposes beneficial to the community" (the White Paper does not seem to distinguish between these two). This overall general principle would help to ensure that decisions were

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103 Above n 3 , 580.

focused in on the central issue. If reference to the existing case law could be used as a guideline and if there is no need to refer to the 1601 preamble at all, then the new definition becomes much more useful. Not only do the courts have clear guiding general principle, they also have the freedom to finally break away from the necessity to relate decisions to the ancient preamble and can begin to make decisions which are and can begin in keeping with the social values of the time.

III A definition based on public benefit

Some statutory definition based on "public benefit" or "purposes beneficial to the community" seems to be a large improvement on the present law. First it comes closer to the popular meaning of the word charity. This is a good thing, taxpayers want the government to support charities so it is fair that the government does in fact support the organisations which have long been accepted as charitable by the general public. As Susan Bright say in a recent article on charity law reform:[104]

"... if public confidence in the charitable sector is to ve maintained it is surely important for the definition of charity to match the public conception of what charity is."

Secondly, such a definition is not vastly different from the old definition, it is just clearer, simpler and no longer related to the 1601 preamble. Relief of poverty, education and religious purposes which are for public benefit will still be

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104 Susan Bright "taking the lid off charity fraud" (1989) 139 New Law Journal, 711, 712.

held charitable. The fourth category in *Pemsel's* case will also be the same apart from the need at present to tie it to the 1601 preamble. Fortunaltey wisdom has stretched the fourth category to meet changing social needs but a new definition based on public benefit would remove the need for "stretching" the category and hiding decisions behind artificial analogies with the preamble.

Objects which were of great importance in 1601 are not nearly so important today. Social conditions have changed. The marriage of poor maids is no longer a concern in today's world. Many of the purposes referred to in the 1601 preamble have now been taken over by the welfare state. For example, the state has now taken over the role of educating the young and giving pensions to the aged. The Ministry of Works is the body which repairs bridges, ports and highways. Today new purposes are considered charitable. Social justice, helping the disadvantaged, human rights and political consciousness are all new charitable impulses.[105]

Another advantage of having a definition of charities based on "public benefit" or "purposes beneficial to the community" is that it ensures that decisions are made according to this relevant and rational principle. At present the question too often becomes what is educational? What is religion? What is politics? The obsession with the meaning of these words is clouding the real issue; that is what is charity? If it is agreed

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105 Vera Houghton discusses these changes in charitable impulses in an article "The Changing Role of Charities" in the book *Perimeters of Social Repair* edited by WHG Armytage and J Peel Academic Press, London New York San Fransisco 1978, 17 - 29.

that charity is activity done voluntarily for the public benefit then the questions can become relevant again, with a purported educational trust the concern will not necessarily be with whether the trust is educational (although if it is then the public benefit almost always follows) but the primary question should be whether the trust is for the public benefit. Rather than having to agonisingly convince oneself that a trust providing squash courts to a college is educational, the task becomes that of proving that the squash courts are for the public benefit. And instead of having to discuss whether a trust is non-political in order for it to have charitable status, the task should be to prove that regardless of or because of its political nature the trust is for the public benefit. Presently there is of course the fourth category of *Pemsels* case as a general public benefit category but this is to be used with reference to 1601 preamble so that the question of public benefit is shackled to the mediaeval ages and the relevant question again becomes subsumed with irrelevant ones, this time in regards to analogies with the purposes in the preamble.

On the whole, the question of public benefit should be approached afresh. The question should be reapplied to each set of new facts and with regard to society's values at the time. However, to some extent previous decisions would be useful in helping judges to make the decision of what is for the public benefit, but only relevant case law should be referred to. Some cases which emphasise for instance the analogies with the 1601 preamble or the rule against politics should be ignored. Other cases, however, which directly discuss the concept of public benefit could be quite helpful. The concept

of public benefit involves two closely related issues. First, whether the purposes are in fact *beneficial* and secondly, whether the purposes are beneficial to the *public*. Traditionally the first of these questions has been shackled to the 1601 preamble and *Pemsel's* categories. With a new definition of charities based on public benefit the 1601 preamble will no longer be relevant, but obviously purposes such as education, relief of poverty, and most religions will still be considered to be for the public benefit. What is beneficial to the public is something which will change through time and charity law has to be flexible enough to keep up with these changes.

The second issue focuses on whether the purpose is of a sufficiently public nature and the present case law is useful in regards to this issue. To be of a sufficient public nature the trust must be for the benefit of the public or a section of the public as opposed to being for the benefit of particular individuals or a fluctuating body of private individuals.. In *Verge* v *Somerville*[106] Lord Wenbury said that for a trust to be for the public benefit it had to be for "an appreciably important section of the community." In *Oppenheim* v *Tobacco Securities Trust Co Ltd*[107] it was said that to be charitable the number of possible beneficiaries must not be numerically negligible and that an aggregate of individuals ascertained by reference to some personal nexus, such as blood or contract, was not the public, or the section of the public for this purpose. Thus in *NZ*

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106 [1924] AC 496.

107 [1951] AC 297.

Society of Accountants v *Commissioners of Inland Revenue*[108] fidelity funds which benefited persons whose money had been stolen by an accountant or soliciter, were held not charitable. The persons benefited as individuals and only as a result of the contractual or fiduciary relationship between the defaulting practitioner and the claimant. The *Accountants*[109] case does however, also discuss the possibility of a slightly different test ie that whether a trust is public or private is a matter of degree in which the existence of a tie of blood or contract is but a feature to be considered. This was the approach taken in *Dingle* v *Turner*[110] and Lord MacDermott who dissented in the *Oppenheim* case. This approach explains why trusts for the relief of poverty do not fail merely because of a nexus between the beneficiaries. This is because the purpose of relief of poverty is of such an altruistic nature that there is an indirect benefit ot the rest of the public. Similarly the cases about curelty to animals are justified on the grounds that prevention of cruelty promotes public morality. This may also be the approach which was taken by Richardson J in the *Accountants* case when he considered whether the public as a whole benefited from the fidelity funds. He concluded that the peace of mind that the public may gain from the awareness that if at some time their money is stolen by a lawyer or accountant they will have ultimate recourse to a fidelity fund, is too remote and nebulous to be regarded as beneficial to the public. Presumably if Richardson J had found some real, albeit, indirect benefit to the public he would have held the

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108 [1986] 1 NZLR 147.

109 Above n 108 per Somers, 156.

110 Above n 4.

trust charitable regardless of the fact that the purpose only directly benefited a group of individuals ascertained by personal nexus. This approach seems preferable to the strict *Oppenheim* principle. The more flexible approach allows the courts to look beyond a personal nexus between indirect beneficiaries and consider how many individuals are benefiting and whether the rest of the public is somehow benefited indirectly in such an altruistic or eleemosynary way as to enable the purposes to be described as charitable.

It is rare, however, for the courts to go as far as granting charitable status to a trust which is of indirect benefit to the whole community but not also tangibly and directly beneficial to some other section of the community, however small. The only trusts to which the courts have granted charitable status on this basis are those for the prevention of cruelty to animals. However, in the future, if a definition was based on public benefit, perhaps the courts would become more willing to consider the possibility of granting charitable status to trusts which confer a significant indirect benefit on the whole community.

To some extent a decision as to public benefit will be influenced by the *purposes* of the trust. Lord Somerville mentions this in *Baddeley* and points out that a trust for promotion of religion benefiting a very small class could be held charitable but that a recreational trust for exclusive use by the same class would not be charitable (although if it was for the use of the whole community it would be). Although Lord Somervill does not explain why this is so, it is probably

because the religious trust not only confers a direct benefit on the small class, but it also confers an indirect benefit on the rest of the community (eg by increasing moral standards and encouraging man to give to others). The recreational trust on the other hand is of much less significance in terms of indirect benefit to the public so it needs to directly benefit a significant section of the community in order to satisfy the public benefit requirement.

The question of whether or not a trust can fairly be said to be for the public benefit is a question of degree. A pragmatic approach to ascertaining public benefit is required along with a willingness to assume the responsibilities of discretion by considering the unique circumstances of each individual case in the light of society's values at the time.

In regards to political activity this new definition based on public benefit would mean that judges would no longer simply assume that because an object is political it is not charitable. The question of public benefit would have to be confronted. Obscure dangerous religious cults and the propagation of foolish views devoid of foundation may not be granted charitable status. They may be religious but the question of public benefit might not be so easily satisfied if the courts were to look at them afresh. Some humanist trusts on the other hand, may well be granted charitable status under the new definition. Many of the sporting trusts now denied charitable status may also gain charitable status under the new definition. This is especially so since modern opinion is of the view that healthy sport and fitness are for the public

benefit and also the cases themselves in this area admit that sporting trusts can be for the public benefit.[111] Poverty trusts would also have to satisfy the requirement of public benefit (they do not in the present definition). This however would not be difficult for most poverty trusts. As Lord Evershed MR said in *Re Scarisbrick*;[112] "the relief of poverty is of so altrustic a character that the public element may necessarily be inferred thereby".

C Fiscal and non-Fiscal Privileges

Another approach to the reform of charity law, which has been suggested from time to time, is to separate the questions of fiscal and non-fiscal privileges. In the words of Lord Cross:[113]

> "... the question whether a trust to further some purpose is so little likely to benefit the public that it ought to be declared invalid and the question whether it is likely to confer such great benefits on the public that it should enjoy fiscal immunity are really two quite different questions. The solution would be to separate them and to say ... that only some charities should enjoy fiscal privileges."

In a recent article on charity reform Susan Bright also argues that the way ahead is to separate entitlement to fiscal privilege from entitlement to essential validity and charitable

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111 Refer to page 18 of this article

112 [1951] Ch 622.

113 Above n 4.

status.[114] She suggests that all purposes which are for the public benefit should be granted charitable status but that not all of these charities should be granted fiscal privileges. Bright considers that the question of which charities should receive fiscal privileges and how much they should each receive is basically a political question of resource allocation. Bright then prefers that the government make the decision as to the granting of fiscal privileges and the decision would presumably be made on the basis of the preceived degree of public beneift of a particular charity. The perceived public benefit would relate to the particular policy objectives and goals of the government in power. Brihgt argues that it would be advantageous to open up fiscal privileges to the democratic processes.

But is it appropriate for these decisions to be made by government? This will result in tax privileges changing every few years with the change in government. Furthermore how can the government possibly attempt to rate the degree of public benefit a particular purpose confers? In many cases it is hard enough for the courts to determine whether a purpose is for the public benefit per se without the task of putting a value on the degree of public benefit. Surely it is easier and more realistic to accept that the taxpayers who provide the tax privileges are prepared to have these privileges endowed on all charities. As the Newark Committee commented "a dural law of charity, a fiscal law and a non-fiscal law, would be manifestly inconvenient."[115]

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114 Above n 80.

115 Newark Committee Report (CMND 396) para 18.

D Should It Be A Statutory Definition?

If charity is to be redefined, it must be decided whether such redefinition should take the form of a statutory definition or whether any such developments should be left in the hands of the judiciary. There is concern that a statutory definition of charity may cause fresh trouble and that the flexibility of the common law would be lost.[116] For example the White Paper states that attempting to make a statutory definition of charity would be "fraught with difficulty, and might put at risk the flexibility of the present law which is both its greatest strength and its most valuable feature."[117] But the so called "flexibility" of the common law in this branch of law seems all to often "arbitariness" and "vagueness". As Keeton and Sheridan have pointedly observed:[118]

> "The present judge made law is flexible only in so far as the technicality of distinction has caused uncertainty. Decisions are based on verbal subtleties rather than principles of recognition of changing public needs in a rapidly changing society."

Part of the reluctance to enact a statutory definition probably stems from a fear that perhaps in another five or ten years the courts would find their hands tied too much and that it would be impossible to extend the boundaries as can now be done. There is no reason however why a statutory definition

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116 See for example: A Sheridan and J Keeton *The Modern Law of Charities* 1983, 58, 59 and G.W Keeton "The Charity Muddle" (1949) Current Legal Problems 86, 102.

117 Above n 16, 6.

118 GW Keeton and LA Sheridan *The Modern Law of Charities* (1971), 47.

should be rigid and unable to adapt to changing social needs. It should be possible for a statutory definition to be in broad terms so as to enunciate some general principle without spelling it out in great detail.

Many writers do consider a statutory definition to be appropriate[119] Enacting a new statutory definition would give judges a clear principle to work from and could clear up some of the tangles in the present law, although not necessarily involve abolishing all the precedents. A statutory definition would not only have the advantage of making things clearer for the judges it would also have the advantage of giving the layperson access to the legal definition of charity. At present the average layperson has no way of easily finding out the legal definition of charity unless he is prepared to wade through case law or legal textbooks of to pay a lawyer to advise him. In New Zealand there is not even a Charity Commission (as in England) to give advice on such matters. At present there is only the 1601 preamble which comes even remotely close to a statutory definition. It is time to remove this from the law once and for all and enact a broad definition which will serve as a new starting point.

E WHO SHOULD DECIDE?

So far this paper has largely assumed that the judiciary is the appropriate body for making the decision as to what and what is not charity. It could be, however, that the law ought to allow a different body to make these decisions. The judiciary

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119 From example see above n 93, 94 and 49.

is reluctant to consciously assume the responsibility of charting the changing area of social need and in effect be the arbiter of social policy at any given time. Its members seem to prefer the application of rigid settled rules. In an article about charity law, Brady comments that the courts:[120]

> ... rightly take the view that it is the business of the legislature to mediate social policy and it is not without significance that our law of charity remains firmly rooted in the last legislative attempt to do so in the early seventeenth centry"

But is it so obviously the job of the legislature to mediate every detail of social policy? Certainly it is often appropriate for the legislature to lay down some general principles to guide the judiciary in its decision making. But it is inevitable that judges will sometimes be left with a certian degree of discretion. In many cases today judges will have to make social and moral value judgments as Keeton and Bentham say. We must learn to rely on a high degree of judicial valour and upon the social acumen of the judges. In the area of political trusts judges seem the most reluctant to make any kind of value judgements. As has already been pointed out this is probably because they fear that it will result in prejudice to their much hallowed impartiality.

If judges are to unwilling so make socially responsible decisions on charity then it has been suggested that a different body should be allowed to make these decisions.[121] Perhaps an

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120 See above n 93.

121 See above n 66.

independent body could be set up which could have the responsibility of deciding whether various organisations are charitable or not. Maybe they could also take up the role of supervising charities' accounting standards and have powers to prevent misappropriation of funds etc. In England a Charity Commission was set up in 1960[122] to perform these types of activities. The Commission has the general function of promoting the effective use of charitable resources by encouraging the development of better methods of administration. They maintain a central register of all charities in England and Wales. Registration of an organisation by the Commission is confirmation of its charitable status and as a consequence the Commission must be satisfied beyond doubt that the organisation can be properly legally defined as a charity. The decisions about charitable status are made in accordance with the present legal definition of charity and appeals lie to the High Court against any decision made by the Commission regarding registration. So ultimately it is still the judiciary which is making the final decisions as to what and what is not charitable. The Charity Commission is not a totally independant body, because it is still bound to follow the courts' decisions. So the Commission cannot register political trusts as charitable even though they do not have a "hallowed impartality" to protect as does the judiciary. And yet many people would be wary of a system where important decisions are made and there is no recourse to the courts.

Perhaps after all the judiciary do have to accept the responsibility of making socially responsive decisons in the

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122 The constitition of the Charity Commission is set out in the first schedule to the Charities Act 1960.

area of charity, it cannot and indeed should not be aiming to escape all types of value judgment. The law is not a totally rigid objective body of rules, it must be flexible enough to permit change. If the courts are given some clearer legislative guidelines for the discharge of their responsibility of deciding what is and what is not a charity then they should be capable of successfully meeting the challenge.

PART V CONCLUSION

The present legal definition of charity is failing to meet contemporary demands. It is failing because it is not based on a rational, flexible general principle but rather it is based on the preamble to a statute enacted in the Elizabethan era. For years writers have pointed out the deficiencies of the present definition and for years Parliament has failed to take up the challenge of redefining charity. The time has well and truly come for Parliament to seek to establish a new and modern definition of charity.

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